

SERVED: October 27, 1999

NTSB Order No. EA-4797

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 19th day of October, 1999

_____	)	
	)	
Application of	)	
	)	
LARRY DEAN LIVINGSTON	)	
	)	Docket 254-EAJA-SE-14331
for an award of attorney's fees	)	
and related expenses under the	)	
Equal Access to Justice Act (EAJA)	)	
_____	)	

**OPINION AND ORDER**

The Administrator appeals from the initial decision of Administrative Law Judge William A. Pope, II, issued on March 20, 1998, awarding applicant \$29,994.33 in attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA").<sup>1</sup> We grant the appeal.

The Administrator issued an order suspending respondent's airman certificates, including his airline transport pilot ("ATP") certificate, on December 21, 1995, alleging that

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<sup>1</sup> A copy of the law judge's written initial decision is attached.

respondent operated N900NC, a DeHavilland DHC-4A Caribou, while it was in disrepair and had unauthorized supplemental oil and fuel tank systems.<sup>2</sup> The Administrator's allegations were based upon information relayed by Canadian authorities who inspected N900NC one day after respondent made an emergency landing in Quebec while ferrying the aircraft from the United States to Zaire. Applicant appealed the Administrator's order to the law judge, who, after a hearing, dismissed the complaint for lack of sufficient evidence. Upon the Administrator's appeal, the Board affirmed the dismissal. Administrator v. Livingston, NTSB Order No. EA-4597 (1997).

Applicant filed the instant EAJA application on October 28, 1997. Although the law judge concluded that "[a]pplicant's legal fees and expenses . . . were paid by his former employer," International Jet Charter, Inc. ("IJC"), the company, apparently, on whose behalf applicant was ferrying N900NC to Zaire, the law judge nonetheless concluded that applicant was entitled to an EAJA recovery. Initial Decision ("ID") at 14. Because applicant's eligibility to recover EAJA fees and expenses under the circumstances of this case is a threshold issue,<sup>3</sup> we turn to

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<sup>2</sup> The attached initial decision recites the details of the Administrator's complaint.

<sup>3</sup> See 5 U.S.C. §§ 504(a)(1); 504(b)(1) (indicating that a party should recover under EAJA only if that party (1) prevailed in the underlying proceeding, (2) meets certain net worth requirements, and (3) incurred the sought fees and expenses in connection with the underlying proceeding; if all those criteria are met, then an adjudicating agency is to make an award, unless the position of the agency which brought the case is found to have been

(continued...)

this issue first.

In order to be eligible to recover under EAJA, a "party"<sup>4</sup> must, among other things, have "incurred"<sup>5</sup> the fees and expenses that are sought.<sup>6</sup> In the instant case, it appears that applicant's litigation costs were borne by IJC. Applicant's EAJA application includes an October 27, 1997, letter to applicant's counsel from an IJC representative listing "expenses paid by IJC related to the FAA v. Larry Livingston litigation" wherein the author also states, "I am making the assumption that you will include your legal charges . . . in the claim you file." The EAJA application also includes a submittal by applicant for

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(...continued)

substantially justified or other factors would make an award unjust). The law judge concluded that the Administrator was not substantially justified in bringing her charges against applicant, and ordered the Administrator to pay an award of \$29,994.33.

<sup>4</sup> Contrary to applicant's assertion that IJC "could easily qualify to make the application here," IJC would not be permitted under EAJA to apply to recover costs it expended on applicant's behalf. Only a party may seek an award, and IJC was not a party to the underlying litigation. See 5 U.S.C. §§ 504(a); 504(b)(1)(B); 551(3) (defining a "party").

<sup>5</sup> "Incurred" is not defined in either the statute or its legislative history. However, "incur" is generally defined as follows:

To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. To become liable or subject to, to bring down upon oneself, as to incur debt, danger, displeasure and penalty, and to become through one's own action liable or subject to.

Black's Law Dictionary 768 (6<sup>TH</sup> ed. 1990) (citations omitted).

<sup>6</sup> See footnote 3, supra.

reimbursement by IJC of litigation expenses, and several of applicant's counsel's meal receipts included in the application have the handwritten notation "International Jet Charter" on them. Finally, one of applicant's counsel's billing statements refers to a consultation with IJC directors regarding a settlement check sent to the FAA.<sup>7</sup> Thus we are confronted with the issue of whether applicant "incurred" these costs.<sup>8</sup>

Applicant argues that IJC merely "advanced" the legal fees and expenses and he now "owes [it] back." To us, this claim implies that respondent would owe the monies regardless of the outcome of the litigation for which IJC allegedly advanced its monies, but there is no evidence of any such obligation or agreement. At most, applicant's assertions indicate, as the law judge found, "at least an implied arrangement between [a]pplicant and IJC to the effect that, if [a]pplicant recovers fees and expenses under EAJA, he will reimburse IJC for the attorney fees

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<sup>7</sup> We also note that applicant did not appeal the law judge's finding that his litigation costs were, in fact, paid for by IJC and, indeed, in a response to a motion now pending before us, applicant's counsel asserts that "IJC paid those fees and costs charged to the respondent." Respondent's Opposition to Administrator's Motion to Strike at 1.

<sup>8</sup> The Aircraft Owners and Pilots Association ("AOPA") has filed a motion, opposed by the Administrator, seeking leave to submit an *amicus curiae* brief in support of applicant's EAJA recovery. In accordance with our regulations, AOPA conditionally filed their brief pending our ruling on their motion. AOPA's submission satisfies the requirements of our regulations and their brief is accepted. 14 C.F.R. § 821.9(b). Although our opinion and order speaks to some of the general arguments AOPA raises in its brief, our opinion and order here is not intended to address, and does not decide, the issues inherent in AOPA's concerns about EAJA recoveries by member-pilots enrolled in its Legal Services Plan.

and expenses which it paid on his behalf in defending this action." ID at 14.<sup>9</sup>

It was this assumed "contingency," apparently, that prompted the law judge to conclude that applicant was eligible to recover under EAJA in light of our opinion in Administrator v. Scott, NTSB Order No. EA-4472 (1996). In Scott we addressed the question of whether there was a policy-based or legal proscription to granting EAJA fees and expenses in the context of contingent fee arrangements. In general terms, under a contingency arrangement the legal representative will be paid from, and only if there is, any recovery under EAJA. In deciding Scott, we reviewed federal case law that has crafted a "fee shifting" exception to the literal meaning of "incurred" in order to carry out "[t]he central objective of the EAJA . . . [which] was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." Spencer v. NLRB, 712 F.2d 539, 549-50 (D.C. Cir. 1983), as cited in SEC v. Comserv Corp., 908 F.2d 1407, 1415 at

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<sup>9</sup> Our view here is consistent with applicant's undocumented claim that he now "owes" IJC money that it "advanced," for he apparently uses such phrases with the view that he is entitled to recover under EAJA and, presumably, that it is permissible to obtain such fees for the sole purpose of reimbursing a third party who funded his successful litigation. The distinction is important, however, for we assume, without deciding, that an applicant who truly had his litigation costs advanced -- that is, the money would be owed even where the litigation proves to be completely unsuccessful -- would be deemed to have incurred such costs.

FN 10 (8<sup>th</sup> Cir. 1990). Essentially, this fee shifting is a policy-based legal construction that deems a prevailing party who was represented pursuant to a contingency fee arrangement to have incurred the associated legal costs. This notion drove our conclusion in Scott that contingency fee arrangements did not bar an EAJA recovery. Scott at 5-9.

We find nothing which indicates applicant is entitled to recover under EAJA. Applicant's attorney will not be deprived of payment, regardless of whether applicant recovers under EAJA. A policy intended to encourage attorneys to represent persons in otherwise "unprofitable" cases therefore is not undermined by a disapproval of fees here. The Comserv case is on point. The Securities and Exchange Commission ("SEC") brought an action against Comserv and several of its officers. After the SEC's action against a particular officer was unsuccessful, the officer sought to recover fees and expenses under an EAJA statute. The SEC objected on the grounds that, among other things, the officer had not incurred any litigation costs since Comserv, which carried litigation insurance, had indemnified the officer for his litigation costs. Comserv, 908 F.2d 1407 at 1409-1410. The court agreed with the SEC. Id. at 1415.<sup>10</sup>

The essence of the Comserv court's opinion is its conclusion that the officer did not "requir[e] the assistance of a federal

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<sup>10</sup> Although the Comserv court applied a different statute, the relevant language is the same. 908 F.2d 1407 at 1410 (quoting 28 U.S.C. § 2412 which, like 5 U.S.C. § 504, is a codification of EAJA).

fee-shifting statute to overcome the deterrent of attorneys' fees." Id. at 1414. In the instant case, IJC funded applicant's defense from the initiation of litigation. Applicant's counsel's billing records even indicate that IJC, not applicant, contacted applicant's counsel about the case and secured his representation of applicant. Thus, like the officer in Comserv, applicant, by virtue of his arrangement with IJC, was "from the inception of the underlying [litigation], . . . able to pursue his defense . . . secure in the knowledge that he would incur no legal liability for attorneys' fees." Comserv at 1414. We agree with the Comserv court that "[t]o hold he 'incurred' such fees is to turn the word upside down." Id. at 1414-1415.<sup>11</sup>

Respondent has not "incurred" fees and expenses within the meaning of the statute and he therefore may not recover them through EAJA.

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<sup>11</sup> Because we conclude that applicant is not eligible for an award of fees and expenses under EAJA, we need not reach the issue of whether the Administrator was substantially justified in maintaining her action. See footnote 3, supra. Nonetheless, we note that the law judge's finding that the Administrator was not substantially justified in bringing her action is difficult to square with precedent holding that the Administrator is substantially justified in proceeding to a hearing "when key factual issues hinge on witness credibility." Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994). The law judge's dismissal of at least some, if not all, of the charges against applicant hinged upon his acceptance of applicant's testimony.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted; and
2. The initial decision awarding applicant fees and expenses is reversed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.